In the Supreme Court of the United States

OCTOBER TERM, 1976

76-1783

NO. _____

WILLIAM LEDEE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LAW OFFICES OF
EUGENE P. SPELLMAN
Attorneys for Petitioner
119 E. Flagler Street
Suite 240
Miami, FL 33131
By: EUGENE P. SPELLMAN
and
DENIS DEAN

MIAMI REVIEW — 371-4853 — 377-3721

INDEX

CITATIONS

CITATIONS (cont.)

OTHER AUTHORITIES

in the

Supreme Court

of the

United States

OCTOBER TERM, 1976

NO. _____

WILLIAM LEDEE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit entered March 31st, 1977 and in which a petition for rehearing was denied April 29th, 1977.

THE OPINION BELOW

The United States Court of Appeals for the Fifth Circuit affirmed the conviction below on March 31st, 1977. The opinion was rendered but not yet reported. (App. A). A timely petition for rehearing was filed and denied on April 29th, 1977. (App. B).

JURISDICTION

The judgment of affirmance by the United States Court of Appeals for the Fifth Circuit was pronounced on March 31st, 1977, with a petition for rehearing being denied April 29th, 1977. Jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

(1) Whether the United States Court of Appeals for the Fifth Circuit correctly determined that there was no error in the trial judge failing to ask prospective jurors Defendant's requested voir dire questions pertaining to reasonable doubt, presumption of innocence and burden of proof.

(2) Whether the United States Court of Appeals for the Fifth Circuit correctly determined that there was no error in the trial judge denying the Defendant's motion for a list of witnesses prior to trial.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides as follows:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment of indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the United States Constitution provides as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation: to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction of the equal protection of the laws. . ."

STATEMENT OF THE CASE

After a jury trial in the United States District Court for the Northern District of Georgia, Petitioner-Defendant was convicted on six (6) counts of transporting in interstate commerce securities (checks) which were falsely made and forged in violation of Title 18, Section 2314, United States Code. Petitioner was sentenced to six years imprisonment.

Appeal was taken to the United States Court of Appeals for the Fifth Circuit and on March 31st, 1977, the conviction was affirmed, with a petition for rehearing being timely filed thereafter and denied on April 29th, 1977. The Petitioner-Defendant is at liberty by virtue of the United States Court of Appeals for the Fifth Circuit issuing a stay of the mandate pending proceedings before the Supreme Court of the United States.

In view of the fact that no issue is presented here concerning the sufficiency of the evidence presented at trial, but only issues pertaining to the jury selection procedures and the pre-trial denial of a motion for list of witnesses, the factual background of this case will not be reviewed.

As part of the pre-trial proceedings in this cause, a motion for list of witnesses was filed on behalf of the Defendant, WILLIAM LEDEE. (App. C). Thereafter, the United States Magistrate entered an order denying the motion for list of witnesses. (App. D).

The procedure utilized by the trial judge in the selection of a jury was that the trial judge would voir dire the prospective jurors utilizing written questions submitted by counsel for the Government and counsel for the Defendant. To that end, prior to trial, counsel for the Defendant submitted a list of requested voir dire questions to the court, included therein were the following questions which counsel requested the court to ask prospective jurors and to which the Government objected and the court refused:

> "(24) Do each of you understand the Government has the burden of proving the Defendant guilty beyond and to the exclusion of a reasonable doubt, and that a reasonable doubt is not a mere fanciful or imaginary doubt, but a doubt to which you can give a reason?
>
> "(25) Do each of you understand an indictment has been returned in this case, and it is not to be considered by you as evidence or indication

of guilt on the part of the Defendant, WILLIAM LEDEE, but rather the indictment is only a vehicle for bringing the person before the Court to stand trial?

"(27) Would any of you hold it against WILLIAM LEDEE if, in fact, he did not testify? In other words, are there any of you that feel that in a criminal case the defendant should testify despite the fact that he is not required to?

"(40) Can each of you accept the proposition of law that a defendant is presumed to be innocent, that he has no burden to establish his innocence, and that he is clothed throughout the trial with this presumption?"

ARGUMENT

(1) Petitioner submits that the denial of the requested list of witnesses to be used by the Government at the trial was a violation of the Due Process Clause of the Fifth Amendment incorporating the equal protection guarantee found in the Fourteenth Amendment to the United States Constitution.

It is the Petitioner's position that not only was it constitutionally improper for the motion for list of witnesses to have been denied, but as will be developed, by virtue of that denial, an intentional and extremely prejudicial situation confronted the Defendant at trial by not having the names of specific witnesses the Government intended to call.

Counsel concedes that the only provision under the United States Code for requiring the Government to produce witness lists is with regard to capital cases (18 U.S.C., §3432)) in which the Government is required to submit a witness list three days before trial in capital cases. It is also true that the proposed Federal Rule of Criminal Procedure, Rule 16(a) (1) (E) providing that each party, the Government and the Defendant, could discover the names and addresses of the other party's witnesses was rejected by Congress. However, it is felt that clearly it is a violation of the Equal Protection Clause of the Constitution of the United States and a denial of due process to require the Government to produce a witness list in a capital case but to deny a defendant the same witness list in a felony case less than capital. By creating a separate classification for persons accused of capital offenses, procedure suffers an equal protection infirmity for which there is no compelling governmental interest justifying the classification.

It has been suggested that the right to advance notice of witnesses against the Defendant and their prior statements be required by the Sixth Amendment and by due process. *Palermo v. United States*, 360 U.S. 343, 79 S.Ct. 1217, 3 L.Ed. 20 1287 (1959). It is worthy of note that the ABA Project on Standards for Criminal Justice proposed that "the names and addresses of persons who the prosecuting attorney intends to call as witness at the hearing or trial" be discoverable as a matter of right. *ABA, Standards Relating to Discovery and Procedure Before Trial*, Section 2(1) (a) (I) (1969).

The Sixth Amendment to the Constitution of the United States provides in part that:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . and to the Assistance of Counsel for his defence."

In view of the Sixth Amendment mandate, it is difficult to see how a denial of a witness list to the person accused of a felony in federal court can be justified when if that same person were charged with a capital offense, he would be entitled to a list of witnesses. It is a clear violation of equal protection of the laws.

It has been recognized that:

> "All standards of equal protection applicable to the States through the Fourteenth Amendment are also applicable to the Federal Government through the Fifth Amendment. To rule otherwise would be totally illogical if not hypocritical. The Due Process Clause of the Fifth Amendment prohibits the Federal Government from creating statutes which establish arbitrary discrimination having no rational basis in legitimate governmental purposes. Although, the equal protection guarantee is not specific, it has been implied into the Due Process Clause of the Fifth Amendment. Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954)." *Morris v. Richardson*, 346 F.Supp. 494 (D.C.Ga. 1972).

The discussion of the Court in *Gregory v. United States*, 369 F.2d 185 (Dist. Col.App. 1966) concerning 18 U.S.C. §3432, requiring that in capital cases the defendant be furnished a list of the names and addresses of the witnesses to be called by the Government is equally applicable to the situation confronting a defendant charged with less than a capital case:

> "The purpose of 18 U.S.C. §3432, requiring that in capital cases the defendant be furnished a list of the names and addresses of the witnesses to be called by the Government is to assist defense counsel in preparing the defense by interviewing the witnesses. *Witnesses, particularly eye-witnesses, to a crime are the property of neither the prosecution nor the defense. Both sides have an equal right and should have an equal opportunity, to interview them.* Here the defendant was denied that opportunity which, not only the statute, but *elemental fairness and due process required that we have.*" (Emphasis Supplied)

As Canon 39 of the Canons of Professional Ethics provides:

> "A lawyer may properly interview any witnesses or prospective witnesses for the opposing side in any civil or criminal action without the consent of opposing counsel or party".

Particularly in a criminal case, "Both equal proctection and due process emphasize the central aim of our entire judicial system—all people charged with crime must so far as the law is concerned, stand on an equality before the Bar of Justice in every American court." *Griffin v. People of the State of Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956).

By virtue of the Government not being required to submit a list of witnesses prior to the trial, the Defendant was placed in a position at trial of having been led by the Government to believe that a particular expert witness was present at the trial, whose testimony would have been favorable to the Defendant, but who, in fact, was still in Washington, D.C. and the Defendant was precluded from obtaining the presence of said witness.

A few days prior to the trial, counsel received a copy of the hand-writing analysis that had been conducted by the FBI Laboratory in Washington, D.C., the result of the analysis being that no conclusion could be reached as to whether or not the person that signed certain submitted documents was the same individual that signed checks which were the subject of the indictment being tried. The hand-writing report was unsigned, however, at the trial the Government prosecutor stated:

> "The hand-writing expert is here, if the defense wants to call him."

It subsequently developed that the hand-writing expert who had prepared the pre-trial report was not, in fact, present and the Government had never subpoenaed him

for trial. When defense counsel requested a continuance in the trial to obtain the presence of the witness, the court denied the request.

The importance of the above is the fact that at trial, the Defendant's ex-girlfriend identified the maker's signature on the checks in question as being that of the Defendant, WILLIAM LEDEE. This is the same signature that the FBI hand-writing expert could not so attribute to the Defendant.

It is clear that had a list of witnesses been supplied to defense counsel prior to trial, subpoenas could have been issued and there would have been no question, but that the desired witness would have been present to testify as a defense witness, rather than the prejudice occurring by the absence of said witness.

(2) The United States Court of Appeals for the Fifth Circuit in affirming the action taken by the trial judge in denying Defendant's requested voir dire questions which are set out above is directly contrary to the decision of the United States Court of Appeals for the Sixth Circuit in *United States v. Blount*, 479 F.2d 650 (6th Cir. 1973).

The trial court in refusing to inquire of the prospective jurors as requested by defense counsel stated that he felt the following statement made to the jury was sufficient. The Judge stated to the prospective jurors:

> "Now, the Court will instruct you, as most of you know who have served on juries, concerning all the various elements of law and the burden

> of proof that is involved. Are there any of you who feel that for any reason you cannot follow the law as stated to you by the Court in instructions. Are there any of you who have any reason to believe that, if selected as juror, you could not follow the law as stated by the Court, whether you disagree with the law or not. Are there any of you who feel that you could not follow the law."

It is submitted by counsel that the above statement made to the prospective jurors is insufficient to enable a Defendant to intelligently exercise either challenges for cause or peremptory challenges based upon possible prejudice and/or bias of the prospective jurors.

The Supreme Court of the United States has made it clear that "the denial or impairment of the right to exercise ones challenges to prospective jurors is reversible error without a showing of prejudice." *Swain v. State of Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed. 20 759 (1965). In the instant case, the questions asked of the veniremen were so restricted as to seriously "impair" appellant's right to exercise challenges, and amounts to an effective "denial" of that right. *Swain*, supra.

Of course, the questions to be asked on voir dire are a matter of the trial Court's discretion, but this discretion is "subject to the essential demands of fairness." *Aldridge v. United States*, 283 U.S. 308, 51 S.Ct. 470 (1931).

It is submitted that the decision in *United States v. Blount*, supra, is directly on point and due to the error in that case, a new trial was granted. In *Blount:*

> "During the voir dire examination of the prospective jurors, the district court refused appellant's request to ask if they could accept the proposition of law that a defendant is presumed to be innocent, has no burden to establish his innocence, and is clothed throughout the trial with this presumption."

> "The primary purpose of the voir dire of jurors is to make possible the empanelling of an impartial jury through questions that permit the intelligent exercise of challenges by counsel. Wright, 2 Federal Practice and Procedure 382 (1969). It follows, then, that a requested question should be asked if an anticipated response would afford the basis for a challenge for cause. See e.g., United States v. Carter, 440 F.2d 1132 (6th Cir. 1971); Brown v. United States, 119 U.S. App.D.C. 203, 238 F.2d 543 (D.C. Cir. 1965). Certainly, a challenge for cause would be sustained if a juror expressed his incapacity to accept the proposition that a defendant is presumed to be innocent despite the fact that he has been accused in an indictment or information. It is equally likely that careful counsel would exercise a peremptory challenge if a juror replied that he could accept this proposition of law on an intellectual level but that it troubled him viscerally because folk wisdom teaches that where there is smoke there must be fire. Accordingly, the failure of the trial judge to

ask the question upon request was erroneous and since the failure may have resulted in the denial of an impartial jury, the error cannot be dismissed as harmless. See Brown v. United States, supra (Burger, J.). It matters not that the putting of the question might also, as appellee contends, have constituted anticipatory argument to precondition the jury. This is an unavoidable consequence of the voir dire jury examination."

The United States Court of Appeals for the Fifth Circuit has recently had an opportunity to comment on the importance of voir dire in *United States v. Nell*, 526 F.2d 1223 (5th Cir. 1976) as follows:

"The jury box is holy place. To insure that those who enter are purged of prejudice, both challenges for cause and the full complement of peremptory challenges are crucial . . . At stake is the party's right guaranteed by the Sixth Amendment to an impartial jury; the principal way this right is implemented is through the system of challenges exercised during the voir dire of prospective jurors . . . Although a trial court has broad discretion in its conduct of voir dire, . . . its exercise of that discretion is "subject to the essential demands of fairness."

It is interesting to note that the Fifth Circuit in addition to citing the *Blount* decision also makes reference to the decision in *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972), cert. denied, 410 U.S. 970, 93 S.Ct. 1443, 35 L.Ed.2d 706 (1972). In *Dellinger*, the right of the defendant to be entitled to have questions asked of prospective jurors which could lead to possible challenges either for cause or peremptorily was discussed as follows:

"One of the paths to the impartial jury guaranteed by the Sixth Amendment is the voir dire examination . . .

"In order to sustain their present contention, it is not necessary for defendants to show that member of the jury were in fact prejudiced. The focus is exclusively on whether the procedure used for testing impartiality created a reasonable assurance that prejudice would be discovered if present . . .

"We start with the exclusion of jurors for cause, where actual bias is admitted or presumed. The Supreme Court has said that ' . . . the trial court has a serious duty to determine the question of actual bias,' Dennis v. United States, 339 U.S. 162, 168 (1950), and that '(a) persons otherwise qualified for jury service are subject to examination as to actual bias.' United States v. Wood, 299 U.S. 123, 133 (1936). Jury service by a person with actual bias in a particular case would violate the right to an impartial jury.

"Subsidiary to challenge for cause is the peremptory challenge where bias is suspected or implied . . .

"The government argues that the court is obligated to inquire only into matters that would disqualify the juror for cause, and that the

court's first group of questions were adequate to produce disclosure of any relevant prejudice. We disagree. The government's position must rest upon an assumption that a general question to the group whether there is any reason they could not be fair and impartial can be relied on to produce a disclosure of any disqualifying state of mind. We do not believe that a prospective juror is so alert to his own prejudices. Thus, it is essential to explore the backgrounds and attitudes of the jurors to some extent in order to discover actual bias, or cause. See Kiernan v. Van Schaik, 347 F.2d 775, 779 (3rd Cir., 1965).

"But beyond this, an answer which falls short of an admission of bias may nevertheless aid counsel in deciding to exercise a peremptory challenge. The Supreme Court has stated that the peremptory challenge, although not required in the Constitution, is 'one of the most important rights secured to the accused,' and that 'the denial or impairment of the right to reversible error without a showing of prejudice'. Swain v. Alabama, 380 U.S. 202, 219 (1965). The peremptory challenge is provided in the federal system by Rule 24(b), F.R.Cr.P.

"If this right is not to be an empty one, the defendants must, upon request, be permitted sufficient inquiry into the background and attitudes of the jurors to enable them to exercise intelligently their peremptory challenges, Cf. United States v. Esquer, 459 F.2d 431, 434 (7th Cir.,

1972); United States v. Lewin, (7th Cir., No. 18662, Aug. 23, 1972); Spells v. United States, 263 F.2d 609, 611 (5th Cir.), cert. denied, 360 U.S. 920 (1959)."

The trial court in the instant case took the position that by asking the prospective jurors if they would accept the proposition of laws given by the judge at the conclusion of the case, even though they might disagree with same, and having received no negative responses the requested voir dire questions submitted by counsel here under attack needed not to have been asked of the jury. First, it seems elementary that if the trial court does not give the jury any benefit of existing law, they could not make an intelligent response as to whether or not they would follow that law. Secondly, in *Ham v. South Carolina*, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973), the court asked the prospective jurors the following questions similar to the all encompassing question asked by the court in the instant case:

> "Are you conscious of any bias or prejudice for or against him (the defendant)?"
>
> "Can you give the State and the defendant a fair and impartial trial?"

The Supreme Court of the United States reversed the *Ham* case on the basis that the above quoted, all encompassing questions, asked by the trial court were insufficient to ferret out any possible racial prejudice against Negroes.

Likewise, in the *United States v. Lewin*, 467 F.2d 1132 (CA 7th 1972), the appellate court found that the general question asked by the trial court to wit:

> "Is there any reason you cannot fairly and impartially try this case?"

was insufficient in ferreting out factors which might expose a basis for challenge.

The court went into detail as follows:

> "Character qualities derivable from interrogation are often elusive and the answers to questions may frequently be illusory as a firm basis for any type of challenge.
>
> "Prejudice and bias are deep running streams more often than not concealed by the calm surface stemming from an awareness of societal distaste for their existence. Extended and trial-delaying interrogation may not pierce the veil, yet a few specific associational questions as a maieutic process may indicate the dormant seeds of prejudice preconceived and unalterable concepts or other nonfairness disqualifications. The result may not reach the stage of being a basis for cause challenge but could well, because of an abundance of counsel, caution, bring about a peremptory challenge which an omniscient eye would have known should have been exercised . . .

> "We think the criticism of too extended voir dire is justified but we are not ready to say that the person who has liberty or, indeed, his property, at stake must be compelled to accept a jury on a strictly cursory, generality interrogation basis.
>
> "At some happy mesne point, there must be permitted sufficient questioning to produce, in the light of the factual situation involved in the particular trial, some basis for a reasonably knowledgeable exercise of the right of challenge . . .
>
> "We do not consider the court's obligation to let counsel on request, get at underlying bases reflecting on bias, prejudice or other suspect factors to be discharged by general questions such as, 'is there any reason you cannot fairly and impartially try this case?' This obligation particularly would not seem to be discharged by general direct confrontation questions on human characteristics that most people are reluctant to admit they possess. . .
>
> "No hard and fast rules can be laid down, but the trial court within the general guidelines hereinbefore set forth must exercise its discretion so as not to block the reasonable exploration of germane factors that might expose a basis for challenge, whether for cause or peremptory.
>
> "The court did ask the prospective jurors whether there was any reason why they could not

give the defendants a fair and impartial trial. Although such an inquiry might be considered broad enough to encompass many of the questions that the defendants wished to pose about particular prejudicial influences, as we have already said, in a case like the present one, a general question is inadequate to call to the attention of the veniremen those important matters that might lead them to recognize or to display their disqualifying attributes. See United States v. Robinson, 466 F.2d 780 (7th Cir. 1972)."

The obligation of an attorney for a Defendant to attempt to discover on voir dire possible grounds for excusing a juror either for cause or peremptorily as has been previously discussed was stated in *Ford v. United States*, 201 F.2d 300 (C.A. 5th 1953):

"It is the right and duty of a defendant to discover on voir dire examination, or from other sources, whether a talesman is subject to disqualification for cause."

It is submitted that simply asking the jury if they could follow the law even though they might disagree with it, without giving some indication as to the law pertaining to reasonable doubt, Defendant's presumption of innocence, and the burden of proof on the part of the Government, cannot possibly put them in a position of making an intelligent answer to the single question asked by the trial court herein so that counsel was placed in a position of not being able to intelligently exercise either his peremptory challenges or challenges for cause.

The purpose of the questions proposed by the Defendant was to aid counsel in intelligently exercising peremptory challenges provided for by law. The refusal of the trial judge to sak these questions or to ask even one relevant question himself "impaired" (*Swain*, supra) Defendant's right to the challenges, in that it forced counsel to either refrain from exercising the challenges or to exercise them merely on the basis of an emotional reaction to the juror's face rather than his or her possible prejudice. In short, the challenges were thoroughly emasculated and an empty gesture replaced the statutory safeguards.

The federal courts almost uniformly, deny the Defendant's counsel the right to personally conduct voir dire examination of prospective jurors but do permit and usually consider requested voir dire questions, submitted in writing, to be asked by the trial judge. However, when the trial judge fails to inquire into areas for which challenges to prospective jurors could be made by counsel, the purpose of the voir dire examination as related in the above cited cases completely breaks down and affords no opportunity for counsel to exercise challenges other than upon questions asked concerning name, residency, occupation, knowledge of parties or facts of the case and similar matters.

Judge Peter Fay, in writing the opinion in the United States Court of Appeals for the Fifth Circuit in this case took the position that voir dire examination should be conducted by counsel for the respective parties and while affirming the action of the trial judge in refusing to ask defense counsel's requested questions, stated:

> "Peremptory challenges are worthless if trial counsel is not afforded an opportunity to gain the necessary information upon which to base such strikes."

It is submitted that the above statement by the Honorable Peter Fay is the entire basis upon which counsel predicates the argument that if counsel are not permitted to question the prospective jurors on a one-to-one basis, then that information can only come from the trial judge asking questions which *counsel* feels are pertinent to the issues about which counsel have knowledge.

The Constitution of the United States gives a defendant the right to "an impartial jury". The trial judge herein put himself in the position of determining those matters which could be asked of the prospective jurors in determining whether they were "impartial". Such a strained interpretation of the Constitution should not be permitted to endure.

CONCLUSION

For the above and foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

LAW OFFICES OF
EUGENE P. SPELLMAN
Attorneys for Petitioner
240 Dade Federal Building
119 E. Flagler Street
Miami, FL 33131

By: 
DENIS DEAN

CERTIFICATE OF SERVICE

I, DENIS DEAN, counsel for the Petitioner, WILLIAM LEDEE, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7 day of ~~May~~ June, 1977, I served a copy of the aforementioned petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit on the Solicitor General, Department of Justice, Washington, D.C. 20530; and Gail McKenzie, Esquire, Assistant United States Attorney, Federal Courthouse, Atlanta, Georgia 30301.

LAW OFFICES OF
EUGENE P. SPELLMAN
Attorneys for Petitioner
240 Dade Federal Building
119 E. Flagler Street
Miami, FL 33131

By: _____
DENIS DEAN

APPENDIX

United States Court of Appeals,
Fifth Circuit.

No. 76-1678.

UNITED STATES of America,
Plaintiff-Appellee,
v.

William LEDEE,
Defendant-Appellant.

March 31, 1977.

Defendant was convicted in the United States District Court for the Northern District of Georgia at Atlanta, William C. O'Kelley, J., of six counts of causing to be transported in interstate commerce falsely made and forged securities and he appealed. The Court of Appeals, Fay, Circuit Judge, held that trial court did not err in failing to give defendant's requested voir dire questions pertaining to reasonable doubt, presumption of innocence, and burden of proof; that even if defendant had been acquitted of an offense involving check which government was permitted to introduce to show course of conduct or scheme by defendant, admission of check into evidence without allowing proof of acquittal was harmless error beyond a reasonable doubt in view of overwhelming evidence of guilt; and that court did not err in denying defendant's request for continuance in order to produce an FBI handwriting examiner.

Affirmed.

1. Jury — 131(2)

Trial judge has wide discretion as to the scope and conduct of voir dire examination. Fed.Rules Crim.Proc. rule 24(a), 18 U.S.C.A.

2. Jury — 131(8)

Trial judge did not err in failing to give defendant's requested voir dire questions pertaining to reasonable doubt, presumption of innocence and burden of proof. Fed. Rules Crim.Proc. rule 24(a), 18 U.S.C.A.

3. Jury — 131(3)

Trial counsel should be afforded opportunity on voir dire to gain necessary information upon which to base peremptory challenges. Fed.Rules Crim.Proc. rule 24(a), 18 U.S.C.A.

4. Criminal Law — 1169.2(2)

Even if defendant charged with causing to be transported in interstate commerce falsely made and forged securities had been acquitted on charge involving a check which government was permitted to introduce to show course of conduct or scheme by defendant, admission of check without allowing proof of acquittal was harmless error beyond a reasonable doubt in view of overwhelming evidence of guilt. 18 U.S.C.A. § 2314.

5. Criminal Law — 600(1)

In prosecution for causing to be transported in interstate commerce falsely made and forged securities, trial court did not err in denying continuance to obtain government's handwriting examiner who had prepared report stating that no conclusion could be reached as to whether person who signed letters from defendant was the same individual who signed as maker on checks involved in the charges where the report was not admitted into evidence and testimony which would have been given by the examiner was stipulated to by the government and explained to the jury by the court and another handwriting examiner was present. 18 U.S.C.A. § 2314.

6. Criminal Law — 491(1)

Government had no obligation to produce the specific handwriting examiner who prepared report stating that no conclusion could be reached as to whether person who signed letters from defendant was the same individual who signed as maker on checks involved in charges of causing falsely made and forged securities to be transported in interstate commerce. 18 U.S.C.A. § 2314.

Appeal from the United States District Court for the Northern District of Georgia.

Before GEWIN, GEE and FAY, Circuit Judges.

FAY, Circuit Judge:

Appellant, William Ledee, brings this appeal from a judgment of conviction entered after a jury found him guilty of six counts of causing to be transported in interstate commerce falsely made and forged securities in violation of 18 U.S.C. § 2314.

Appellant raises six different points of error in this appeal. The three we think merit discussion are:

1. Whether the court erred in failing to give appellant's requested voir dire questions pertaining to reasonable doubt, presumption of innocence, and burden of proof.

2. Whether the court erred in refusing to allow the appellant to present evidence before the jury that he had been previously acquitted on a charge involving a check which the government was permitted to introduce as part of the alleged scheme.

3. Whether the court erred in denying the appellant's request for a continuance in order to produce an F.B.I. handwriting examiner. Each is discussed below.

In 1974, appellant deposited seven checks drawn on the Pan American Bank of Tampa in Tampa, Florida into an account which appellant maintained at the Trust Company Bank in Atlanta, Georgia. The government proved that at the time these deposits were made appellant knew that the account in the bank of Tampa was closed and that the checks were forged or falsely made. Appellant was convicted on six of the seven counts charged and sentenced to six years incarceration. We affirm.

The first point appellant asserts is that the court below erred in failing to give appellant's requested voir dire questions pertaining to reasonable doubt, presumption of innocence and burden of proof. The questions requested, objected to by the government and refused by the court are set out in the margin.[1] Instead, the court asked the prospective jurors:

> Now the Court will instruct you, as most of you know who have served on juries, concerning all the various elements of law and the burden of proof that is involved. Are there any of you who feel that for any reason you cannot follow the law as stated to you by the Court in instructions. Are there any of you who have any reason to believe that, if selected as juror, you could not follow the law as stated by the Court, whether you disagree with the law or not. Are there any of you who feel you could not follow the law.

[1] (24) Do each of you understand the Government has the burden of proving the Defendant guilty beyond and to the exclusion of a reasonable doubt, and that a reasonable doubt is not a mere fanciful or imaginary doubt, but a doubt to which you can give a reason?

(25) Do each of you understand an indictment has been returned in this case, and is not to be considered by you as evidence or indication of guilt on the part of the Defendant, WILLIAM LEDEE, but rather the indictment is only a vehicle for bringing the person before the Court to stand trial?

(26) Do each of you understand that in a criminal trial the Defendant is not required to present any testimony and does not have to testify in his own behalf, and that this right is given him by the Constitution of the United States?

(27) Would any of you hold it against WILLIAM LEDEE if, in fact, he did not testify? In other words, are there any of you that feel that in a criminal case the defendant should testify despite the fact that he is not required to?

(40) Can each of you accept the proposition of law that a defendant is presumed to be innocent, that he has no burden to establish his innocence, and that he is clothed throughout the trial with this presumption?

The instructions read to the jury at the close of the case included the law embodied in the appellant's questions.

Appellant raises the issue of whether, during voir dire of prospective jurors, the court must, upon request, inquire whether the jurors can accept certain propositions of law.

[1] Rule 24(a) of the Federal Rules of Criminal Procedure states:

> The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

This rule allows the trial judge wide discretion as to the scope and conduct of voir dire examination and the decisions in this circuit have given the rule just such a liberal interpretation.[2] In particular the Fifth Circuit and several other circuits as well have held that it is not an abuse of

[2]United States v. Hill, 500 F.2d 733 (5th Cir. 1974), cert. den., 420 U.S. 952, 95 S.Ct. 1336, 43 L.Ed.2d 430 (1975); United States v. Eastwood, 489 F.2d 818 (5th Cir. 1973); United States v. Goodwin, 470 F.2d 893 (5th Cir. 1972), cert. den., 411 U.S. 969, 93 S.Ct. 2160, 36 L.Ed.2d 691 (1973); Tillman v. United States, 406 F.2d 930 (5th Cir. 1969); Bellard v. United States, 356 F.2d 437 (5th Cir. 1966), cert den., 385 U.S. 856, 87 S.Ct. 103, 17 L.Ed.2d 83 (1966); Fox v. United States, 296 F.2d 217 (5th Cir. 1961), per curiam, cert. den., 369 U.S. 888, 82 S.Ct. 1160, 8 L.Ed.2d 287 (1962).

that discretion to refuse to allow inquiries of jurors as to whether they can accept certain propositions of law.[3]

In Stone v. United States, 324 F.2d 804 (5th Cir. 1963) defense counsel was personally permitted to question the prospective jurors during voir dire examination. He inquired of the prospective jurors,

> . . . if at the close of this case the evidence appears to be well balanced, or even, would you tend to favor one side or the other?

The court immediately cautioned that questions that call for conclusions of law must first be addressed to the court. The court refused to allow the question in that form and then asked the prospective jurors if they would accept the law as the judge gives it to them. On appeal the Fifth Circuit agreed with the trial court's actions stating:

> The procedure to be followed in a voir dire examination of jurors in a criminal case is within the discretion of the trial court. (Citations omitted)
>
> The trial court did not permit the questioning of jurors with respect to propositions of law and its action was a proper one.

Supra, p. 807.

[3]Stone v. United States, 324 F.2d 804 (5th Cir. 1963), cert. den., 376 U.S. 938, 84 S.Ct. 793, 11 L.Ed.2d 659 (1964); United States v. Gillette, 383 F.2d 843 (2nd Cir. 1967); United States v. Wooten, 518 F.2d 943 (3rd Cir. 1975), cert. den., 423 U.S. 895, 96 S.Ct. 196, 46 L.Ed.2d 128 (1975); United States v. Cosby, 529 F.2d 143 (8th Cir. 1976); United States v. Crawford, 444 F.2d 1404 (10th Cir. 1971), per curiam, cert. den., 404 U.S. 855, 92 S.Ct. 98, 30 L.Ed.2d 95 (1971). Appellant cites United States v. Blount, 479 F.2d 650 (6th Cir. 1973) which holds to the contrary and is not the law in this circuit.

[2] We therefore find no error in the decision of the trial court to sustain the government's objection to the five requested questions and recognize that the weight of authority supports this ruling. However, we must acknowledge that voir dire examination in both civil and criminal cases has little meaning if it is not conducted by counsel for the parties.

> A judge cannot have the same grasp of the facts, the complexities and nuances as the trial attorneys entrusted with the preparation of the case. The court does not know the strength and weaknesses of each litigant's case. Justice requires that each lawyer be given an opportunity to ferret out possible bias and prejudice of which the juror himself may be unaware until certain facts are revealed.[4]

The federal and state courts employ different methods of voir dire examination. In the federal courts questioning is generally done by the judge and counsel may submit questions for the jury which the judge may or may not use. In most states the judge may ask introductory questions and then counsel for the parties may pursue their examination with reasonable limits on time and scope of the subject matter.[5] The American Bar Association Commission on Standards of Judicial Administration suggests a procedure somewhere in between, that is:

> It should partake of the "federal" method in having the judge carry the burden of questioning, thus realizing economies of time and achieving an implicit

[4]Frates & Greer, Jury Voir Dire: The Lawyer's Perspective, 2 A.B.A. Litigation No. 2 (1976).

[5]American Bar Association Standards, Trial Courts, § 2.12 (1976).

> identification of the jury as a neutral body. It should partake of the "state" method in affording counsel reasonable opportunity for direct questioning of jurors individually. In situations where the jurors may have previous information about the case, experience and research clearly indicate the importance of voir dire by counsel as a means of restoring an impartial attitude. The same opportunity should be afforded where the jurors are likely to have strong predisposition arising out of the nature of the case itself.[6]

[3] Even though the assignment of error in the case was the question of allowing the jury to be questioned as to propositions of law and not the question of allowing counsel to conduct voir dire we believe, after considering both, the real issue is whether the voir dire examination uncovers possible prejudice and bias of any juror so that a fair and impartial jury may be impaneled. Peremptory challenges are worthless if trial counsel is not afforded an opportunity to gain the necessary information upon which to base such strikes.

[4] The second assignment of error is whether the court below erred in refusing to allow appellant to present evidence before the jury that he had been previously acquitted on a charge involving a check which the government was permitted to introduce to show a course of conduct or scheme by appellant.

There were two trials of this case, the first ended in a hung jury and the second in a conviction. The superceding

[6]American Bar Association Standards, Trial Courts, § 2.12 (1976).

indictment which precipitated the second trial was different from the first indictment in two ways. First, the spelling of the name of the maker of all seven checks was changed from "Sumya te Quira" to "Siempre te Quiero". Second, an additional date was added in count seven. The seventh count on the first indictment alleged the check in question had a single issue date of May 15, 1974. The seventh count in the second indictment alleged the check in question had two issue dates — May 15, 1974 and June 15, 1974.

During the first trial, at the close of all the evidence, the trial judge granted a judgment of acquittal as to Count VII because the government failed to introduce evidence to support that charge; that is, the check offered in evidence to prove Count VII had two issue dates and was therefore different from the check described in Count VII of the indictment. Appellant was properly charged in the second indictment under Count VII but for reasons unknown to this court the government voluntarily dismissed Count VII at the opening of the second trial.

Under these circumstances it is doubtful that appellant was acquitted of an offense involving the check with two issue dates that was admitted into evidence.[7] Assuming arguendo that appellant was acquitted on Count VII involving the check, the admission into evidence of that check without allowing proof of acquittal was harmless error beyond a reasonable doubt in view of the overwhelming evidence of guilt. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

[7]The check described in Count VII of the second indictment was admitted into evidence to establish a continuing scheme but appellant does not claim this was error.

Briefly, facts relevant to the third assignment of error surrounding the requested continuance to obtain the government's handwriting examiner are as follows:

A few days prior to the second trial, defense counsel received a copy of a handwriting analysis conducted by the F.B.I. laboratory in Washington, D.C. and prepared during the interval between the first and second trials. The result of the handwriting analysis was that no conclusion could be reached as to whether or not the person who signed the cards and letters (from appellant to his girlfriend) in evidence was the same individual who signed as the maker on the checks involved in the charges.

[5, 6] Appellant claims error because the government did not call to testify the handwriting examiner who prepared the report and the defense needed a continuance to call him. We cannot agree with this contention for the following reasons. First, the report was not admitted into evidence, and testimony which would have been given by the F.B.I. handwriting examiner was stipulated to by the government and explained to the jury by the court.[8]

[8]Court:

"Now, it is further stipulated that Government Exhibits 1 and 2 which are in evidence, which are check Nos. 751 and 753, were submitted to a handwriting expert of the Federal Bureau of Investigation in Washington, D.C., along with the exhibits which have been marked as Governments' Exhibits 11—A through 11—H, these letters containing handwritten letters, and that that expert, after examining those letters and examining the two checks in issue, would testify, if present and under oath, that a definite conclusion was not reached as to whether these signatures on the front of Governments' Exhibits 1 and 2 —was unable to reach a conclusion as to whether those signatures were prepared by William J. Ledee after having reviewed those and Exhibits 11-A through H due to the presence of distortion in portions of the questioned writing and the presence of unexplained handwriting characteristics.

In other words, the handwriting expert could not come to any conclusion as to whether Mr. Ledee or who wrote those two signatures. (Record on appeal, Vol. II, p. 214).

Second, there was no promise by the government that the same handwriting examiner who prepared the report would be present. Another F.B.I. handwriting examiner was present (if needed) or appellant could have provided their own expert. Thus there was no obligation on the part of the government to produce the specific witness and no basis for appellant's reliance upon the government. The court did not abuse its discretion by denying appellant's request for continuance.

The court has reviewed all other assignments of error and finds them to be totally without merit. The conviction is affirmed.

[TITLE OMITTED]

Appeal from the United States District Court for the Northern District of Georgia

---

ON PETITION FOR REHEARING

(APRIL 29, 1977)

Before GEWIN, GEE and FAY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Peter T. Fay

United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CRIMINAL INDICTMENT

NO. 75-251

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM LEDEE,

Defendant.

MOTION FOR LIST OF WITNESSES AND MEMORANDUM OF LAW

COMES NOW, the defendant, WILLIAM LEDEE, by and through his undersigned counsel, and moves this Honorable Court to order the United States Attorney to produce, at least three (3) entire days before commencement of the trial, a list of witnesses to be produced on the trial for proving the indictment, stating the address of each witness.

MEMORANDUM OF LAW

This motion for list of witnesses is made upon the following authorities:

5th Amendment, United States Constitution

6th Amendment, United States Constitution
18 U.S. Code, Section 3432
Bolling v. Sharpe, 347 U.S. 497
Pugh v. Rainwater, 355 F.Supp. 1286 (Fla. 1973)
United States v. Houston, 336 F.Supp. 762 (Ga. 1972)
United States v. Eley, 336 F.Supp. 353 (Ga. 1972)
Gregory v. United States, 369 F.2d 185 (Dist. Col. C.A. 1966)
United States v. Ahmad, 53 F.R.D. 186 (Penn. 1971)

It is submitted that by virtue of 18 U.S. Code, Section 3432, the defendant is discriminated against to such a gross extent that his 5th Amendment due process guarantees are being violated by the Government not supplying the list of witnesses requested above.

The pronouncement of the United States Court of Appeals, District of Columbia Circuit, in the decision of Gregory v. United States, 369 F2d 185 (1966), regarding 18 U.S. Code, Section 3432, applies equally to any defendant indicted by the Government and placed in the position of preparing a defense against that indictment:

> "The purpose of 18 U.S.C. Section 3432 requiring that in capital cases the defendant be furnished a list of the names and addresses of the witnesses to be called by the Government is to assist defense counsel in preparing the defense by interviewing the witnesses. Witnesses, particularly eye witnesses, to a crime are the property of neither the

prosecution nor the defense. Both sides have an equal right, and should have an equal opportunity to interview them."

LAW OFFICES OF
EUGENE P. SPELLMAN
Attorney for Defendant

By: _____
DENIS DEAN

I HEREBY CERTIFY that a copy of the above and foregoins was mailed to Gale McKenzie, Esquire, Assistant United States Attorney, Room 402, Federal Courthouse Building, Atlanta, Georgia 30301 on this 29th day of December, 1975.

[TITLE OMITTED]

(Filed January 13, 1976)

MAGISTRATE'S ORDER ON DEFENDANT'S MOTION FOR A LIST OF THE GOVERNMENT'S WITNESSES

Defendant WILLIAM LEDEE is charged in a seven count indictment[1] in the above-captioned case with causing to be transported in interstate commerce falsely made and forged securities in violation of 18 U.S.C. §2314. He has filed a motion to require the government to furnish him with a list of its witnesses at least three days before commencement of trial which has been scheduled for January 19, 1976. Since this is not a capital case, there is no government duty to furnish defendant with a list of its witnesses. See 18 U.S.C. §3432 (government witness list required three days before trial in capital case); Bohn v. United States, 260 F.2d 773 (8th Cir. 1959), cert. denied 358 U.S. 931, reh. denied 360 U.S. 907; *Downing v. United States*, 348 F.2d 594 (5th Cir. 1965), cert. denied 382 U.S. 901; *United States v. Baggett*, 455 F.2d 476 (5th Cir. 1972); and *United States v. Anderson*, 481 F.2d 685 (1973). It should also be noted that proposed Federal Rules of Criminal Procedure Rule 16(a) (1) (E) providing that each party, the government and defendant, may discover the names and addresses of the other party's witnesses was rejected by Congress, thereby making the names and addresses of a party's witnesses non-discoverable. In addition, there has been a previous trial in this

[1]It should be noted that at a previous trial on September 22, 1975, the Court granted defendant's motion for judgment of acquittal as to count seven.

case which ended in a mistrial and the names of the government witnesses who testified at said trial are already known to defendant. While there may be additional witnesses on the retrial, defendant has not shown sufficient reasons why the Court should exercise its discretion in favor of requiring the government to provide him with a list of its witnesses.

For the foregoing reasons, defendant's motion for an order directing the government to provide him with a list of its witnesses three days before commencement of trial is overruled and denied.

Let a copy of this Order be served by mail upon counsel for the parties.

AND IT IS SO ORDERED this 9th day of January, 1976.

s/ Allen L. Chancey, Jr.

ALLEN L. CHANCEY, JR.
UNITED STATES
MAGISTRATE